Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996	)	CC Docket No. 96-146
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage	)	CG Docket No. 04-244
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards	)	RM-8783
Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services	)	ENF-95-20

AT&T COMMENTS

Pursuant to Section 1.415 of the Commission's rules (47 C.F.R. § 1.415), AT&T Corp. ("AT&T") submits these comments on the Commission's *NPRM* in this proceeding to review the effectiveness of its rules governing pay-per-call services, related audiotext information services, and toll-free numbers.[1]

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1 *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996; Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage;*

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In response to widespread consumer complaints concerning "misleading and unethical marketing practices" in the provision of audiotext services,[2] Congress in 1992 enacted the Telephone Disclosure and Dispute Resolution Act ("TDDRA") to curtail such abuses in pay-per-call related services.[3] The Commission thereafter adopted implementing regulations requiring that all interstate pay-per-call services be provided either through 900 numbers or through toll-free 800 numbers using alternate billing mechanisms (such as credit or charge cards).[4]

Unscrupulous pay-per-call providers were quick to adapt their service offerings to skirt the TDDRA statute and the Commission's rules. In response, Congress in the Telecommunications Act of 1996 modified Section 228 to eliminate one widely abused exemption from the definition of pay-per-call services and to strengthen restrictions on the use of toll-free numbers to provide audiotext services.[5] Even before

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Truth-in-Billing and Billing Format; Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act; Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards; Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services, CC Dockets Nos. 96-146 and 98-170, CG Docket No. 04-244, RM-8783, and ENF-95-20, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 04-162 (rel. July 16, 2004) ("*NPRM*"), 69 F.R. 61,152 (Oct. 15, 2004).

2 *See* H.R. Rep. 1096, 102 Cong., 2nd Sess. (December 31, 1992) at 106.

3 *See* Telephone Disclosure and Dispute Resolution Act of 1992, Pub. L. No. 192-556, 106 Stat. 4181 (1992), *codified at* 47 U.S.C. § 228.

4 *See Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, Order on Reconsideration and Further Notice of Proposed Rulemaking, 9 FCC Rcd 6891 (1994).

5 Specifically, the 1996 Act eliminated the prior exemption in 47 U.S.C. § 228(i) for tariffed services, and prohibited callers from being assessed a charge for a pay-per call

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those amendments, however, the Commission staff had moved aggressively to constrain attempts by opportunistic carriers and audiotext providers acting in concert with them to subvert the important consumer protections of the TDDRA statute.

Specifically, in its 1995 *Marlowe Ruling*,[6] the Commission staff acting on delegated authority ruled that sharing by a carrier of end user revenues with an information provider ("IP") on calls terminated to ordinary ("POTS") telephone numbers "evade[s] the letter and spirit of [Section 228] and the [statute's] important consumer safeguards for information services." The Commission staff recognized the economic realities of such revenue sharing arrangements that bring them squarely within the ambit of the TDDRA statute:

> The fact that the consumer does not directly pay the information provider does not exclude the service from the definition of pay-per-call if the payment is simply paid to the information provider by the carrier and then recovered from the consumer through the transport charge.

The staff saw through such a two-step transaction simply as "a sham" in which "the consumer has, in fact, paid the carrier for transport and the [information]

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service by virtue of being asked to connect, or being transferred to, a toll-free number. 47 U.S.C. § 228(c)(7)(E). Additionally, the amendments prohibited charges using toll-free numbers without written agreements, and required the using of Personal Identification Numbers ("PINs") in connection with such agreements. 47 U.S.C. §§ 228 (c)(7)(C), (c)(8)(C).

6 *Ronald J. Marlowe*, Esq., DA 95-1905, 10 FCC Rcd 10,945 (Com. Car. Bur. 1995) ("*Marlowe Ruling*").

provider, albeit indirectly, for the information."[7] The staff conclusion in the *Marlowe Ruling* stood unaltered for more than eight years following the issuance of that decision.[8]

Consistent with the *Marlowe Ruling*, when the Commission initiated its rulemaking to implement the 1996 amendments to TDDRA, it tentatively concluded that "any form of remuneration" from a carrier to an information provider or other entity advertising an information service, or "any reciprocal arrangements between such entities" constitutes *per se* evidence that the offering is a pay-per-call service, and therefore subject to the restrictions of TDDRA.[9] In March 2003, the Commission requested parties to refresh the record in this proceeding, but did not signal any intention to retreat from its tentative conclusion in the *1996 NPRM* that revenue sharing is an impermissible evasion of TDDRA.[10]

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7 *Id.*, 10 FCC Rcd at 10-946.

8 In a separate companion holding, the *Marlowe Ruling* concluded that sharing by a carrier of its transport charges with an information provider also violated the carrier's common carriage obligations under Section 201 of the Communications Act. That aspect of the *Marlowe Ruling* was overruled by the full Commission in *AT&T v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001). However, the staff's holding that such revenue sharing violates TDDRA remained undisturbed by the *Jefferson Telephone* decision. *See id.*, 16 FCC Rcd at 16,133 ¶ 6n. 18 (declining to address question of TDDRA violation and restricting discussion to common carriage claim). *See also AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041, 4042 (2002) ¶ 1 n.6 (declining to address TDDRA violation claim in access revenue sharing by local exchange carrier with information provider); *AT&T Corp. v. Beehive Telephone Co.*, 17 FCC Rcd 11,641, 11,655 (2002) n. 99 (same).

9 *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, CC Docket No. 96-146, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14738, 14756 (1996) ("*1996 NPRM*") ¶ 48.

10 *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, CC Docket No. 96-146, Public Notice, 18 FCC Rcd 4942 (2003).

Against this background, the current *NPRM*'s opposite tentative conclusion is unfortunate. The *NPRM* now tentatively concludes that the Commission's decision in *Jefferson Telephone* – which expressly *declined* to reach the issue whether revenue sharing violates TDDRA – "calls into question" the continuing vitality of the *1996 NPRM*'s tentative conclusion premised on the *Marlowe Ruling* that carrier-information provider revenue sharing schemes violate Section 228 of the Communications Act.[11] The *NPRM* goes on to state the Commission "no longer reach[es] that tentative conclusion," and invites comment "whether it is possible or appropriate to find that any revenue-sharing arrangements do not comply with sections [*sic*] 228."[12]

AT&T respectfully suggests that the *NPRM*'s new tentative conclusion does not comport with the duty that Congress imposed on the Commission to protect consumers from abusive pay-per-call practices. As the *1996 NPRM* correctly recognized, provision of audiotext and other pay-per-call services through POTS numbers using carrier-information provider revenue sharing, rather than through 900 numbers or toll-free numbers with appropriate presubscription and billing arrangements, subverts the objectives of TDDRA in two critical respects.[13] First, these dialing arrangements defeat

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11 *NPRM*, ¶ 31.

12 *Id.*

13 *See 1996 NPRM*, 11 FCC Rcd at 14742 ¶ 1("The full panoply of protective measures applicable to pay-per-call services under the TDDRA are not available to consumers if IPs structure certain information services to fit, ostensibly, within exemptions to pay-per-call status"); *id.* at 14743 ("As regulations governing information services and related enforcement actions have evolved over the past several years, some IPs (and collaborating carriers) have varied the structure and operation of their services and the

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the ability of end users to avail themselves of mandatorily-available services to block access to the 900 service access code to avoid the high charges -- and, in many cases, objectionable content -- associated with pay-per-call services.[14] Equally important, unlike calls to pay-per-call services placed over 900 and toll-free numbers, consumers who incur charges for calls placed to information services using POTS dialing sequences are subject to potential disconnection of their telephone service for failure to pay such charges.[15]

The Commission in the *1996 NPRM* also recognized the central role that revenue-sharing arrangements play in creating these serious harms to consumers' interests:

> [I]n some instances, common carriers apparently collaborate with IPs to design services that evade the current requirements, and leave consumers uninformed about their rights and responsibilities and unable to control use of their telephone lines to reach information services. As regulations governing information services and related enforcement actions have evolved over the past several years, some IPs (and collaborating carriers) have varied the structure and operation of their services and the dialing sequences used in an effort to avoid federal disclosure, blocking, and billing requirements applicable to interstate pay-per-call services.[16]

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dialing sequences used in an effort to avoid federal disclosure, blocking, and billing requirements applicable to interstate pay-per-call services.")

14 *Id.*, 10 FCC Rcd at 14742 ¶ 11 (noting that "because these services are not offered through 900 numbers, telephone subscribers are unable to block their access to such services").

15 *Id.*

16 Id., 10 FCC Rcd at 14743-14744 ¶ 13 (footnote omitted). *See also id.*, 10 FCC Rcd at 14750 ¶ 39 (footnote omitted) (noting that IPs have offered their services through domestic POTS numbers "[i]n apparent efforts to avoid consumer safeguards applicable to 900 number services" and that IPs have adopted such dialing procedures "sometimes

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The current *NPRM*'s proposed retreat from the statements that the Commission expressed in its *1996 NPRM* would be unfortunate as a matter of law and public policy. As a threshold matter, there appears to be no need or basis for the current *NPRM*'s concern that the Commission's *Jefferson Telephone* decision "calls into question" the *1996 NPRM*'s tentative conclusion regarding revenue-sharing arrangements between a carrier and an information provider. That is so because, as even the current *NPRM* acknowledges, the Commission's decision in *Jefferson Telephone* did "*not* address[] the application of section 228" to such a revenue-sharing arrangement.[17] The current *NPRM* also does not explain why it is necessary or desirable to retreat from the Commission's prior recognition in the *1996 NPRM* that consumers suffer serious adverse consequences from the use of POTS numbers to provide information services.

There have also been no changes in the telecommunications marketplace that would support the current *NPRM*'s creation of a "clean slate" concerning the permissibility of revenue-sharing arrangements between carriers and information providers. AT&T has already demonstrated in the Commission's pay-per-call rulemakings that revenue-sharing arrangements by both incumbent local exchange

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with the apparent encouragement of carriers who pay commissions to IPs in exchange for the increased traffic generated by information-service calls").

17 *NPRM*, ¶ 31 (emphasis supplied). Notably, at the time the *Marlowe Ruling* was rendered, the TDDRA statute still contained an exemption from pay-per-call classification for tariffed services. *See* former 47 U.S.C. § 228(i). That exemption was eliminated in the 1996 Act. The elimination of that exemption, which unscrupulous information providers and carriers sharing revenues with them had used as a "loophole" to evade the pay-per-call regime, further underscores the correctness of the *Marlowe Ruling*.

carriers ("ILECs") and competitive local exchange carriers ("CLECs") have produced enormous volumes of traffic over POTS numbers to so-called "chat lines".[18] Despite the Commission's access reform initiatives in recent years, AT&T's current traffic data indicates that substantial volumes of calling continue to be terminated on such chat lines (or, relatedly, on avowedly "free" teleconferencing bridges) served by local carriers whose access charges are often materially above the national average. For example, during one thirty day period from mid-February to mid-March, 2004, more than 14.5 million minutes of traffic were terminated over AT&T's network to 50 domestic chat lines. Those calls, which are nominally charged to end users at ordinary long distance rates, are in fact funded in the first instance by legitimate carriers through inflated access charges and, in the final analysis, by end users who might otherwise benefit from lower rates were exorbitant access costs not imposed on the target carriers through revenue-sharing arrangements.

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[18] *See* Further Comments of AT&T in CC Docket No 96-146, filed May 12, 2003, at 3 n.7, *citing Beehive Telephone, Transmittal No. 6,* 12 FCC Rcd. 16130 (2001) (revenue sharing arrangement with a "chat line" designed to stimulate calling to ILEC serving 700 access lines resulted in a tenfold increase in traffic to Beehive's exchange); *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc.* v. *AT&T Corp.,* 16 FCC Rcd. 5726 (2001), *aff'd in relevant part,* 317 F.3d 227 (D.C. Cir. 2003) (revenue sharing arrangement between a sham competitive access provider in rural Oklahoma and chat line provider in only four months generated 10 million minutes in terminating access usage charged to AT&T at rate 27 percent higher than prior access charges in same locale); *AT&T* v. *Jefferson Telephone Co., supra* (rural ILECs serving 3,400 lines generated 2.3 million minutes *per month* in terminating access usage billed to AT&T through revenue sharing arrangement with chat line provider); *AT&T v. Frontier Communications of Mt. Pulaski, Inc., supra*; *Haxtun Telephone* v. *AT&T Corp.*, 57 Fed. Appx. 355, 357 (10th Cir. 2003) (illicit revenue sharing arrangement with a "chat line" in rural Colorado increased AT&T's terminating access charges for interstate calls by over 2000 percent).

AT&T respectfully suggests that the Commission should decline to follow the current *NPRM*'s tentative conclusion, but instead follow the clear and unambiguous consumer-protection objectives that Congress reflected in the original enactment of TDDRA and further strengthened in the 1996 Act. Accordingly, the Commission should reinstate, and proceed to adopt, the *1996 NPRM*'s tentative conclusion that any form of remuneration to an entity providing or advertising an information service by a common carrier which charges a telephone subscriber for an interstate call to that information service is *per se* evidence that such an arrangement is definitionally a pay-per-call service under TDDRA and is required to be offered solely in accordance with the requirements of that statute and the Commission's implementing regulations.

Respectfully submitted,

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